United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term 1957

No. 13,853

No. 658-56

United States Court of Appeals
For the
District of Columbia Circuit

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Joseph W. Stewart
CLERK

OTIS AUSTIN
otherwise known as
OTIS ALSTON, ... APPELLANT,

vs.

THE UNITED STATES OF AMERICA,, ... APPELLEE.

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APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

- - -

7553

INDEX

Reporter's Transcript of Proceedings.

Witnesses:

Theodore R. Cherry, Jr., direct examination. 1

Theodore R. Cherry, Jr., cross examination 5

Dorothy Jackson, direct examination. 6

Dorothy Jackson, cross examination 9

Mary E. Judkins, direct examination. 13

Mary E. Judkins, cross examination 15

Wallace Valentine, direct examination. 15

Wallace Valentine, cross examination 19

Otis Austin, direct examination. 21

Otis Austin, cross examination 30

Otis Austin, redirect examination. 32

Opening Arguments on Behalf of United States, ... 32

Argument on Behalf of Defendant,. 33

Closing Argument on Behalf of United States,. 35

Jury Charge,. 36

Indictment, ... 40

Plea of Defendant,, ... 40

Verdict,. 41

Judgment and Commitment,. 41

- - -

JOINT APPENDIX

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THEODORE R. CHERRY, JR. (7)

was called as a witness by the Government and, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DONEGAN:

Q Sir, you are Theodore R. Cherry, Jr.?

A Yes, sir.

Q And your employment, sir, is what?

A Sir?

Q What is your employment?

A Automotive mechanic, sir, U. S. Air Force.

Q United States Air Force?

A Yes, sir.

Q Now, when you went to 1510 S Street, Northwest, were you by (8) yourself or with any other person?

A I was with two other persons, sir.

Q And who were they?

A Dorothy Jackson and her boy friend, Thomas something -- I forget the name.

Q Now, at 1510 S Street, who resides in those premises?

A Sir?

Q Who lives at 1510 S Street, Northwest?

A Mary Judkins.

Q Does she live there by herself or with any other person?

A By herself, as far as I know.

Q On your arrival there, was there any person besides Mary present?

A Yes, sir. (9)

Q Who was that?

A Otis Austin.

Q The person of that name -- is he here today?

A Yes, sir.

Q Would you point him out?

A Over there (indicating).

MR. DONEGAN: May the record show, Your Honor, this witness identifies this defendant?

THE COURT: Yes.

BY MR. DONEGAN:

Q Now, tell to the Court and to the jury what if anything (9) occurred on your arrival at 1510 S Street.

A Dorothy kicked Mary's door down, kicked it in rather, and she started inside. And she turned around and she took off and ran and went past the boy friend outside up above the stairs and --

Q Now, hold your voice up so you can be heard.

A And she went past her boy friend and she said something that I could not hear. So he took off too, both of them, and ran up the street. I turned back again and looked at the door, and just before this fellow entered the door, he had two pistols in his hands.

Q What fellow are you speaking of?

A Otis Austin.

And he was holding them up like this (indicating), and Mary -- (10) she was standing in the hallway back behind there and she told him -- she screamed and told him -- no, she said, "Don't do that." She said, "That is a friend of mine."

He seen me standing there and he got to the door and he looked around and looked up both ways up the street and he dropped the pistols -- you know -- dropped them down and put them back in his belt and turned back in the house.

And so then Dorothy came back. She came back and went in the door, and I still stood there watching Mary in the hallway. And Mary said, "Come on in and close the door." She said, "It is cold out there."

And so I went in behind Dorothy and we went down to the bedroom, and we were sitting in the bedroom.

Q Who was present in the bedroom? Name the people in the bedroom.

A Dorothy entered the bedroom first. I went next. Otis went in the bedroom first, rather, Dorothy behind him, and I behind her and Otis.

Dorothy and Mary started to quarreling about Otis being there. And just before the door went in, why Dorothy said Otis -- she knew Otis was there because she seen the car parked outside, and that Mary was in there with her baby's father. That is when she kicked the door down and went in.

Well, Otis came to the door with the pistols and he turned around (11) after Mary screamed at him and told him, "No, don't do that." He put them back in his belt and went back in the house, and all of us was in there together.

Q Where was the boy friend of Dorothy Jackson?

A He came later.

Q To the bedroom? (11)

A Yes, sir.

Q All right, now, state to the Court and to the jury what took place other than the argument between Dorothy and Mary in the bedroom.

A Otis drew the pistols on Dorothy and told her that he would kill her. And so Mary told him -- Mary looked at him and said, "No, you aint going to do nothing to her in here." He waved the pistols in Mary's face and told her to get back, and so Mary didn't say nothing. When I looked at the other fellow, he didn't say anything.

So I got up and I went over to him and talked to him, you know, and told him not to do that, not to shoot the girl, that he would only get us all in trouble.

So I patted him on his arm, talking to him. He put the pistols down. He said, "I will listen to you." He put the pistols down there then.

And later he flashed them again at Dorothy, threw them on Dorothy again, and the third time he came out with them I was fixing to take a drink. And he shot one of them -- I don't know which one -- he shot in the bedroom, (12) in the living room the first time. I mean he put them back in his pocket so quick I didn't see. So I felt it go by my knee. That was too close for comfort. So I told him -- I don't remember whether I told him I was going or I would see him later, or I just got up and headed to the door.

Anyway, when I got to the door I couldn't get it open. Dorothy came out and got in front of me and reached and got the door, and the door came open. And so her boy friend called her again. He had ran out and he called her. Otis told Dorothy she wasn't going no place, and he hit her and knocked her down on the floor.

So I couldn't get out then. I was waiting for her to get up, you know, so I could make it on out.

And I turned and looked at him the last time, you know, when Dorothy was almost up, and he had one of the pistols in my face and I heard something click, so I took it and when I got --

Q You say you took it?

A I took it, yes, sir.

Q Explain what you did.

A I took it with my left hand.

Q What is "it"?

A The pistol, sir.

Q Do you know what kind of a pistol it was?

A It was a civilian-type job. I thought it was a .38. I don't (13) know too much about civilian --

Q A civilian-type pistol?

A Yes.

Q All right.

A And when I got that one, he reached to get the .45 with his left hand out of his belt, and when he did why then I released the other one on the floor and put my right hand over the front of it, the .45, and pressed hard on it so it wouldn't shoot, and then I pressed the other hand behind it so it would move, and I talked to him.

After, I asked him, I said, "Man, I haven't done nothing to you, you know."

He told me he wasn't after me.

And I told him, "Wait a minute. Don't shoot me with this thing."

He told me, he said, "I am not after you. I am not going to shoot you. Turn me loose."

I said, "O. K." I turned him loose and he backed in the door, and I was only standing in the door, and Dorothy screamed at him and told him, "If it hadn't been for that no-good Mary, you would never hit me." She said, "You would have never hit me," and so on.

As she was speaking, he backed in the door and the pistol went off.

Q Do you know what if anything was struck by the bullet? (14)

A I was, sir, in my right -- left leg.

Q Where was that?

A In my left femur.

Q What was the nature of your injury?

A A broken bone.

Q I can't hear you.

A A broken femur, sir.

Q And what if anything was done in the way of treatment for that?

A Oh, yes, sir; I am still in the hospital for that, sir, I had one operation.

Q In your testimony you spoke of a civilian-type gun and you (15) spoke of a .45?

A Yes, sir.

Q Which does Government's Exhibit for Identification No. 1 look like?

A This looks like the one he had in his right hand.

Q Is that the one you stated clicked?

A This is the one that I heard -- I heard it click, yes, sir. (15) I heard something click.

Q But did not fire a bullet? (16)

A No, sir.

CROSS EXAMINATION

BY MR. NEALON:

Q Who was with you when you went to the apartment of Mary Judkins?

A Dorothy and her boy friend by the name of Thompson.

Q Dorothy who?

A Dorothy Jackson, I guess.

Q Dorothy Jackson, She and who else was with you?

A Her boy friend. I don't know her boy friend's name, sir.

Q When you first arrived. Well, between whom were the bad (22) feelings?

A It was Dorothy.

Q Between Dorothy, who was accompanying Thomas; is that correct?

A Dorothy and Otis Austin and Mary.

Q The two girls and the defendant; is that right?

A Yes, but they didn't -- I mean Dorothy and Mary -- they had the argument at first, and I don't pay that no mind. But when the fellow -- when Austin started flashing the gun, I mean that is when I got up because I didn't know him.

Q As soon as you walked into the apartment were these guns (23) visible?

A Sure they were visible in his belt where I could see them.

Q When you came in they were visible?

A He had them in his hands when he got to the door.

Q When he got to the door he had them in his hands; is that correct?

A That is right.

Q Well, now, you have testified that when the door was kicked (25) down that Otis Austin, the defendant, came to the door. How was he holding the guns at the time?

A He was holding them up like this (indicating).

Q At something like a 45 degree angle? And you still came there to that apartment?

A He was not bothering me.

Q He didn't bother you at all?

A He didn't say anything to me.

Q What did he say at that time? (25)

A Nothing that I can remember.

Q Just standing there holding the guns; is that it?

A He was just standing there holding the guns.

Q And you proceeded to go into the apartment?

A After he had turned and walked away.

Q During the whole course of the evening, did, at any time (26) during the evening, yourself or Mr. Thomas -- I believe the name is -- (27) Thompson -- did you at any time restrain the liberty of the defendant and tell him he couldn't leave and to sit down and have a drink?

A No, indeed.

Q You did not?

A No, I did not.

Q Did Mr. Thomas in your presence say anything threatening to --

A I didn't hear him say anything.

Q You didn't hear him say anything?

A No.

DOROTHY JACKSON (35)

was called as a witness by the Government and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DONEGAN:

Q You are Dorothy Jackson?

A Yes, I am.

Q And you reside at 937 M Street, Northwest, District of Columbia?

A Yes.

Q Now, directing your time specifically to around midnight to (36) 1:00 o'clock in the morning, where were you at that time?

A At 15 -- I was at Mary's house up on S Street.

Q What is Mary's last name.

A Mary Judkins.

Q Would that address be 1510 S Street, Northwest?

A Yes.

Q Now, were you there by yourself or with others?

A I was there with others.

Q Can you name then, please?

A Randolph Thompson.

Q Randolph Thompson?

A Yes. And Theodore Cherry and Otis Austin and Mary Judkins. (36)

Q Now, whom did you arrive there with?

A Theodore and Randolph Thompson.

Q Now, will you state to the Court and the jury what happened, beginning with the two men and yourself going to the door of 1510 S Street?

A Well, when we approached at the door the lights were off, and then the light in the back came on. And me and Cherry were both at the door, but I don't know -- he says that I kicked the door open -- and I figured that he took and kicked it open. But we both were there at the same time and Randolph was behind us -- and I am not definitely sure what happened (37) to the door.

But when we approached there, Otis was in the room with Mary. And I said something to him and he hauled off and knocked me down, and Cherry helped me up.

Q What happened next?

A Then they were discussing about Cherry was telling him not to do that and he continued to do it also after he hit me.

Q Now, did you ever leave the apartment and return?

A I did.

Q When was that that you went out and came back?

A When he took and knocked me down and Cherry helped me out the door.

Q Was that when you first got there?

A Yes.

Q All right, continue.

A And then we came back in again, and Cherry was talking to him and he told Cherry about he was the man -- he was the biggest one because he was the man behind the two guns.

Q Who was this?

A Otis Austin.

Q He was the man behind two guns?

A Yes.

Q Well, when was it you first saw the defendant with the two guns? (38)

A That was at my house in 937 M Street.

Q At your house?

A The early part of the night.

Q At what time?

A It would have to be about 9 o'clock, or something like that.

Q Well, is it all the same night? (38)

A Yes.

Q So it would be January 23, 1956, at 9 o'clock in the evening?

A Yes.

Q At your home?

A Yes.

Q State to the Court and jury how you saw two guns there?

A I mean he was just exposing them, just showing them off.

Q All right. What happened after the drinking between the (40) defendant and the complainant?

A Well, I was going into the front room. Otis said, "I should kill you." And that is when Cherry came back into the door. But he wasn't intending on shooting him. He was intending on shooting me.

Q What did he say to you other than, "I am going to shoot you"?

A He called me a couple of names.

Q Was there an argument going on at that time between you and Otis?

A Yes, it was.

Q Tell the Court and jury what the argument was about?

A Well, I figured that it was wrong in a way because I had been going with him and Mary was my best friend and I didn't know that he was up there, which when I did get there he had to be smart and so forth and hit me, which I didn't like.

Q Now, state to the Court what happened at the time he said he was going to shoot you.

A Well, I had just turned my back to him and that is when Cherry ran into the door, and Cherry took and hit his arm and the gun went off first -- it went off then.

Then they got outside and I was standing by the door and Cherry was (41) down on the ground and that is when he shot him again. And he told him if he didn't get up by the time he counted to ten he would kill him.

Q Did you see what Cherry did at that time?

A Cherry just crawled up the steps and got underneath the car.

A And did you see what Otis Austin did at that time?

A Yes, I did.

Q What?

A He went to go to his car to go off.

Q And did you go and do or say anything at that time?

A Yes, I told him he would have to take the boy to the hospital (41) and that is when he got out of his car and came back over.

Q Now, at any time in the evening before going to 1510, did you see Cherry with any guns?

A No, I didn't.

Q Did you at any time see a gun in Cherry's hands?

A No, I didn't.

Q Other than the two guns of Otis, did you see anyone else with a gun?

A No.

Q Showing you what is marked Government's Exhibit for Identification No. 1, I ask if you have seen this prior to this morning.

A I have seen this one too, but I have seen this one too, but (42) there was another one too.

Q Where have you seen that one?

A I seen both of them on M Street when he first showed them to us.

Q That is at 9 o'clock in the evening, at your home?

A Yes.

Q All right, did you see it later?

A Yes, that night.

Q Where?

A When he brought them -- drawed them up there at Mary's house.

Q Showing you Exhibit No. 2 for identification, have you seen that prior to this evening?

A Yes, I have seen it.

Q Where?

A I have seen that on M Street, too, the first time I ever seen it.

Q Your testimony has been about two guns. Were these the guns?

A Yes.

MR. DONEGAN: Nothing further, Your Honor.

CROSS EXAMINATION

BY MR. NEALON:

Q Do you know anything about 9 o'clock that evening?

A Yes.

Q And what do you know about 9 o'clock that evening?

A Well, Otis came up to the house and he rode me and Mary around to the corner, around to the Howard Theater.

Q He rode you and who?

A Mary.

Q Mary who? (43)

A Judkins.

Q Around to the theater and --

A And then he brought us back home and then he went up to the first floor with us to where my mother was up there in the lady's apartment (44) in the front room, and my mother came out in the hall and was talking -- my mother came out in the hall and she was talking to him and he was showing us the gun, and the lady in the front room sent the kids back in the room.

Q Out in the hall he was showing you a gun?

A Yes.

Q And did she -- what time did the defendant, Otis Austin, leave?

A It would have to be around about 11 o'clock.

Q And where did he go then?

A He took my mother down southwest to my aunt's house, and he was supposed to be taking Mary to her house -- drove off -- and at her house -- and then he was going back to the theater and pick up his wife.

Q And where were you in the period between 9 and 11 o'clock?

A Downstairs. (45)

Q Down where?

A Downstairs where I live at.

Q Whom were you with?

A I was with Randolph Thompson.

Q Randolph Thompson?

A Yes.

Q And where does he live?

A He was living at 1323 Twelfth Street.

Q Is he a good friend of yours?

A Yes, he is.

Q Have you seen him lately?

A No, I haven't. He is not here.

Q When is the last time you saw him?

A Well, around about two months ago.

Q About two months ago?

A Yes.

Q Did he let you know where he was going?

A Yes, he let me know he went to California.

Q To where?

A Hayward, California. (44)

Q Do you know his street address out there?

A Yes, 5059 Fifth Avenue.

Q 5059 Fifth Avenue?

A Yes.

Q Did you at any time apprise anybody or let anybody know (46) whether this man had an address?

A Yes, I did.

Q Whom did you let know?

A I can't pronounced his name.

MR. DONEGAN: Donegan, myself?

THE WITNESS: Mr. Donegan.

BY MR. NEALON:

Q You let Mr. Donegan know he had an address and you knew where he was?

A Yes.

Q And you got into the apartment by someone knocking down the door? (53)

A Yes.

Q And at that time what was the actual reason for Cherry stating that he paid the rent to Otis Austin?

A What was the reason?

Q Yes. Why did he say that?

A Well, first, Cherry was getting ready to hit Mary, and he (54) took it up.

Q Cherry was getting ready --

A To hit Mary, and Otis took it up.

Q Took it up?

A Yes.

Q What do you mean, tried to defend Mary?

A Yes.

Q And then what happened?

A And then -- I mean he started talking to Cherry, and from there on they just kept on arguing together.

Q Did Cherry at any time say any strong words to Otis Austin?

A No.

Q He did not?

A No, he didn't.

Q Did he threaten him?

A No, he didn't.

Q Did Austin threaten Cherry? (54)

A No more than he told him he was the man behind the guns. That was enough threat right there.

Q The gun had come into play by this time?

A Yes.

Q Where was the first time you saw the guns?

A On M Street, 937.

Q And at this apartment at 1510 S Street, where was the first (55) time you saw the gun?

A After they had the argument in the bedroom.

Q And actually describe the incident whereby someone was shot. (55) Describe that for me.

Q Well, Otis came into the apartment where I was at and he said, "I should kill you."

Q To whom?

A To me. That is what he said to me.

Then just at that time I was turning off from him. I had my back to him. That is when Cherry came in the front door and grabbed his arm, and the bullet went off.

Q You had your back turned? (57)

A Yes, I did.

Q Well, in other words, you didn't know who had the gun?

A I knew he had the gun. I had seen it. I was turning away from him. I was figuring I was trying to get out of his way.

Q Was that gun ever put down any place by anybody?

A No.

Q In other words, Mr. Cherry was coming to your defense at the time?

A Yes, he was.

Q Whereas Mr. Austin, the defendant, at a previous occasion was protecting Mary from Mr. Cherry; is that correct?

A No, that is not correct.

Q You did not say in your testimony --

A That was at that part. I am talking about this part right now where you asked me who --

Q At a previous time during the course of the evening, he --

A Yes, he was protecting Mary.

Q He was protecting Mary?

A Yes, he was. (57)

Q From whom?

A From Cherry.

Q And, to your knowledge, why was Cherry angry with Mary Judkins? (58)

A Well, I don't know that.

Q And after the shot was fired, what happened then?

A After the first shot was fired in the room?

Q Yes.

A Well, Cherry was going out. After he was going out, Otis took a shot again and that is when he fell down on the step. Otis said, "If you don't get up by the time I count ten, I will kill you." And that is when Cherry crawled up the steps and crawled underneath the car.

Q Are you sure that Mr. Cherry crawled up those steps? Did you see him?

A Yes, I did. I was standing right there at the door.

MARY E. JUDKINS (61)

was called as a witness by the Government and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DONEGAN:

Q Your name is Mary E. Judkins?

A Yes.

Q And you live at 1321 R Street, Northwest, District of Columbia?

A Yes.

Q Now, directing your attention to Tuesday, January 24, 1956, on that date where did you live?

A 1510 S Street, Northwest.

Q Speak just a little louder so we can hear you.

A 1510 S Street, Northwest.

Q In the District of Columbia?

A Yes.

Q Now, did you live there by yourself or with any other person?

A I lived alone.

Q Alone?

A Yes.

Q Now, did anything unusual take place at your apartment on that day of January 24?

A Yes. (62)

Q About what time did this unusual occurrence take place?

A I would say it was about between 12:30 and 1:05.

Q Now, who was present at the time it happened?

A Theodore Cherry and Dorothy Jackson and Otis Austin and Randolph Thompson and myself.

Q Now, you state to the Court and jury what happened.

A Well, on that evening Otis Austin came in at Dorothy Jackson's house at 937 M Street. I was there waiting for Theodore Cherry. And at the time we was there, Dorothy Jackson's mother asked Otis if he would take her to southwest, and he did. And she asked him if he would take me home to S Street. So he went with me home to S Street to wait for Dorothy. And at the time we were there waiting for Dorothy, Dorothy and Theodore Cherry came up. And Theodore Cherry came in. And some of them knocked at the door, and Dorothy called me and I didn't get to the door I guess as quick as she throught I could. Some of them kicked the door open, and Dorothy came in first. And then Theodore Cherry came in after. He engaged in argument with Dorothy and Otis Austin. They engaged in argument about something, a little girl or something.

Q All right. What if anything happened that you saw? (63)

A Otis and Dorothy was arguing, and Theodore Cherry, and Otis (64) got the guns on Dorothy about two or three times, and Theodore Cherry went over and told Otis to don't shoot Dorothy with the guns after she turned her back on him -- told him to don't shoot her. Theodore Cherry went over and told him to don't shoot her because he would get in trouble.

Q All right, then what happened after that?

A And the police all had Otis standing at the patrol wagon, and I took them and showed them where Otis' car was, and they were looking for the guns. I took them and showed them where the car was.

Q Where was the car of Otis Austin?

A It was parked on 16th Street, Northwest.

Q How far from where you were living?

A Well, it was parked on 16th Street. I live at 15th and S, (65) and his car was parked at 16th and S, between the middle of the block.

Q Did you take some police officer over there?

A Yes, I did.

Q What if anything was found?

A They found two guns on the bumper of the car. (65)

Q Which bumper?

A On the bumper of Otis Austin's car.

Q He had a front bumper and a back bumper.

A The back.

Q The back bumper?

A Yes.

Q Two guns on Otis Austin's car?

A That is right.

CROSS EXAMINATION (66)

BY MR. NEALSON:

Q Well, how many people were there when this gun was being (67) shown at 937 M Street?

A It was -- well, it was quite a few people in the hall at the time -- I would say six, approximately, including some kids that was in the hall.

WALLACE VALENTINE (83)

was called as a witness by the Government and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DONEGAN:

Q Sir, you are Detective Wallace Valentine?

A Yes, sir.

Q And you are a member of the Metropolitan Police Department of the District of Columbia?

A Yes, sir.

Q What is your duty assignment?

A I am presently assigned to the Robbery Squad, Metropolitan Police Department.

Q Now, directing your attention to on or about January 24, 1956, what was your assignment on that date?

A I was assigned as a precinct detective at the Third Precinct.

Q Now, were you on duty any of the hours of the 24th of January, 1956?

A Yes, I worked 7 p.m. to 3 a.m.

Q Now, directing your attention to approximately 1 o'clock in the morning on that date, did you have any occasion to arrest one Otis Austin?

A I did, sir.

Q Is the person of that name whom you arrested here today? (84)

A He is.

Q Will you point him out? (84)

A The gentlemen sitting over there (indicating).

MR. DONEGAN: May the record show, Your Honor, that this witness identified the defendant?

THE COURT: Yes.

BY MR. DONEGAN:

Q State to the Court and jury the circumstances for the arrest.

A Approximately 1:10 a.m. a shooting call came out over the police radio at 1510 S Street, Northwest. Shortly after arrival there, I observed the defendant holding the complainant.

Q Who is that, the complainant?

A Theodore Roosevelt Cherry. And he was attempting to put him in the police scout car. Cherry had been shot.

I asked Cherry, "Who shot you?" Cherry pointed to the defendant and said, "That man shot me."

I then placed the defendant under arrest.

Then, after a short period of conversation with Mary Judkins, I went to the northeast corner of 16th and S Street, Northwest, to look for the weapons that had been used. I found on the rear bumper of the defendant's car a .45 calibre semi-automatic pistol and a .32 calibre revolver, (85) which I seized.

Q Showing you what is marked Government's Exhibit for identification No. 2, I ask you if you have seen this prior to this afternoon?

A Yes, sir, I have.

Q Showing you what is marked Government's Exhibit for identification No. 1, have you seen this prior to this afternoon?

A Yes, sir, I have.

Q Where have you seen these two weapons?

A They were recovered from the bumper of a Chevrolet, which was parked on the northeast corner of 16th and S Streets, Northwest, the auto which belonged to the defendant.

Q Now, did there come a time when you spoke to the defendant, Otis Austin?

A I did, sir.

Q What if anything did he have to say as to the shooting occurring that date?

A I interrogated him at the Third Precinct in regard to the shooting.

He told me that the .45 was not his; that Theodore Cherry had the (85)
45. He told me that the .32 calibre revolver was his.

I then asked him, "Well, if you had the revolver and Cherry had (86)
the automatic, how did they both get on the back bumper of your automobile?" He stated, "I don't know."

And he stated that Cherry pointed this gun at him and was going to shoot him, and he snapped this gun at Theodore Cherry but that it did not fire, and then he started tussling with Cherry for this 45 automatic, which he stated Cherry had in his hands. And during the ensuing tussle the gun went off and Cherry was hit in the leg.

Q Now, did you have an opportunity to speak with Cherry?

A Yes, sir; very briefly. At the hospital I tried to talk to him but he was in pain, and on the way to the Bolling Air Force Base Hospital, so I did not have too much time to talk to him.

Q Did there come any later opportunity for speaking with Cherry?

A Yes, sir.

Q In the presence of the defendant?

A No, sir.

Q Now, showing you part of Exhibit No. 1 for identification, which consists of some five shells, will you examine those and state if there is any unusual appearance to any one of the bullets? First, state what calibre they are.

A These are .32 short cartridges.

Q Now, are you familiar as to where those bullets came from? (87

A Yes, sir.

Q Where was that?

A They were all inside the revolver when it was recovered, all inside the cylinder, which makes it fully loaded.

Q Is there anything unusual as to any bullets?

A Yes, sir; the primer cap is indented in one cartridge.

Q What would be the meaning of that?

A It means that the firing pin, which is this little instrument right here (indicating), when struck against the primer cap fires the cartridge through the barrel of the revolver. This primer cap is indented but it misfired. It did not go off.

Q Well, now, is that the same thing as saying that the trigger was pulled and the hammer strick the shell but did not discharge the bullet?

A Yes, sir. (87)

Q And that would be a clicking sound?

A Yes, sir; it would be a snapping sound like a cap pistol.

Q Now, directing your attention to the bullets that are with Exhibit No. 2 for identification, how many are there?

A There are six fully loaded rounds of 45 calibre ammunition, (88) and one spent cartridge.

Q Are you familiar with where those bullets were procured?

A Yes, sir, I am.

Q State it to the Court and jury.

A One cartridge fully loaded was obtained in the chamber of this weapon. One fully loaded round was recovered from the overcoat pocket of the defendant.

Q You mean Otis Austin?

A Otis Austin's overcoat pocket at the time of his arrest.

Q Where was the overcoat?

A He was wearing it.

Q And one 45 shell was in that overcoat?

A One 45 shell was in that overcoat. And another completely loaded 45 shell was under the front seat of his automobile.

Q Is that the vehicle you testified was at 16th and S Streets?

A Yes, sir.

Q The Chevrolet?

A Yes, sir.

And there were three fully loaded rounds remained in the clip.

Q Now, was there any further recovery of any bullet?

A Yes, sir; a search of the basement front room of 1510 S (89) Street revealed this spent cartridge (indicating).

I hunted for another catridge but I could not find it. This is the only spent cartridge that I did find, and it was in the front room of 1510 S Street.

Q Did you search Cherry at the time he was put into the police cruiser to go to the hospital?

A No, sir.

Q Did you subsequently do that?

A Yes, sir; I checked his belongings at the hospital.

Q Was there any recovery of any type weapons or bullets from Cherry?

A No, sir.

BY MR. NEALON:

Q Was anybody standing on the street, except Mr. Cherry and (90) the defendant?

A Oh, there was a crowd of people there.

Q Was there another man, Thompson?

A I was told later on that a man named Thompson was there. (91)

Q Did you ever interview Thompson?

A I tried to, sir, but I understand he moved to California.

Q Was Dorothy Jackson there, or Mary Judkins?

A They were there, yes, sir.

Q Who told you where to go to find the weapon?

A Mary Judkins.

Q Mary Judkins, did?

A No, sir, she told me where the car was.

Q Yes. For what purpose did she say it at that time?

A I don't know. I asked her did he have an automobile and she replied, "Yes, he does," because a search of his person at the scene at the time of his arrest revealed he had no weapons on him.

Q He had none?

A No weapons.

Q Did he have his overcoat on at that time?

A Yes, sir, and one spent round in his pocket.

Q Did you find that in the overcoat at that time?

A Yes, sir.

Q At the time in front of the apartment house?

A Yes, sir.

Q And you never found the guns at that time?

A Not on his person, no, sir; shortly thereafter at the corner (92) of 16th and S Streets.

Q And what did tell you at that time, that he had never seen that 45 excepting on the person of Cherry; is that right?

A Yes, sir.

Q The 45?

A Yes, sir; this one.

Q He said he had the other gun right with him?

A Yes, sir; he said he owned this gun. (92)

Q Do you know if this gun here will fire?

A No, sir; I do not.

Q Did you check it?

A No, sir.

Q Did you take it to the police laboratory or anything for them to check it?

A No, sir.

Q Do you know enough about ordnance to try to fire that gun as it is, empty?

A Yes, sir.

Q Would you try it?

THE COURT: I do not think we had better have a demonstration in here. He can go down to the shooting gallery, if it is important.

MR. NEALON: The defendant tells me --

THE COURT: I have ruled on it, Mr. Nealon. It can be done, if (93) you want it done, downstairs. We won't have a gun shot in the courtroom, empty or loaded.

If you want it done, if it is important, we have a shooting gallery downstairs to do it after court adjourns today.

Q You were told that he did not. (95)

And I think a critical question here is if you could just remember who was present of the parties. In other words, there was Corporal Cherry who was present and the defendant who was present. Was Mr. Thomas present at the time when you pulled up in the scout car?

A That I do not know, sir. I did not see Mr. Thompson.

Q Thompson?

A I did not see Mr. Thompson there on the scene. I took no recognizance of him until I interviewed these people at the precinct. Then I asked the witnesses, "Well, where is Mr. Thompson?" And they told me Mr. Thompson had departed.

Q He had departed immediately?

A Yes, sir.

Q And you have never seen him since?

A No, sir. I had an address where he was employed and tried to get in touch with him there, but he no longer works there.

Q How soon after did you try to contact him?

A Oh, the next week. (96)

Q It was a week later?

A Yes, sir.

Q And they told you at that time at his employment--what did they tell you there?

A They said he no longer worked there. Then I contacted the witnesses and asked if they knew where he was. They said they knew he moved to California.

MR. NEALON: No further questions.

MR. DONEGAN: No questions.

(Witness withdrew from stand.)

MR. DONEGAR: Your Honor, that concludes the witnesses for the Government.

By stipulation with defense counsel, Mr. Nealon, the stipulation is to the effect that if Captain Slominski of the Metropolitan Police Department were to appear here as a witness, he would testify that what is marked Government's Exhibit No. 3 for identification is a record prepared by himself, stating that Otis Austin, alias Otis Alston, does not, according to the records of the Metropolitan Police Department, possess a permit to carry a pistol in the District of Columbia.

THE COURT: All right.

OTIS AUSTIN, (97)

the defendant, was called as a witness in his own behalf and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEALON:

Q Would you give us your full name, please.

A Otis Austin, Jr.

Q Would you tell us your occupation?

A I was a car wash foreman.

Q Where was that, sir?

A 933 H Street, Southwest.

Q When did you stop being a foreman at the car wash?

A On the night that I was arrested.

Q And could you tell me in your own words, without leaving out any details, the events from say 6 o'clock in the evening until this incident happened and was over with?

A Yes, sir. (98)

Q Please do so, and speak loudly and clearly.

A Well, I got off from work on the evening of the 23rd at about 8 o'clock. It was a night I had to stick around until the fellows got paid off.

So I left and went to my uncle's on H Street, Southwest. My grandmother asked me if I would stop back by and move some things for her. So I told her I would after I would go home and come back.

So I left there and went home, directly home, and my wife asked me to drop her by the theater. This was about 9 o'clock when I left home to bring my wife to the Howard Theater.

So she told me when I finished moving the things for my grandmother to drop back by and pick her up, so I told her I would.

So after I dropped my wife off at the theater, I goes to southwest to my uncle's and takes some packages from my uncle's over to my father's in southeast for my grandmother and brought my father back to southwest.

So we sit there about a half an hour and I was talking with my grandmother. I had not seen her in a good while, so I told her I had to go pick my wife up. So they excused me.

I came from there on my way back to pick up my wife at the Howard (99) Theater and noticed my watch that it wasn't quite time for the theater to let out.

I had my two kids, small kids, home alone, so I decided to go by and look at them and see how my kids were getting along.

So on my way back uptown I came down M Street, and in 900-block of M Street, as I was stopping for the stop sign at 10th and M, I saw this girl's mother, Dorothy's mother, standing on the sidewalk with a little baby in her hand. So I asked her what would she be standing out there for, cold as it were this time of night. She said her husband got drunk and was beating her up. She is paralyzed -- the whole left side of her body is paralyzed.

So I said, "Well, what are you waiting for?" She said, "I am waiting for a taxicab."

I said, "If you are going some place, I will take you." She said, "O.K., I would appreciate it."

I told her to get in the car. Of course, I was double parked and I couldn't get out of the car in the middle of the street.

So she put the baby in the car and tried to get in, and this girl, Mary, came to the door and asked me did she need any help. She told her she would

appreciate it if she could help her in the car. (99)

So after Bea got in the car, this girl asked Bea if she wanted (100) her to go with her over southwest to her sister's. So she told her if she wanted to go, it was O.K. So they asked me whether it was O.K. if she went along. I told them it was O.K. So she got in the car with us.

We went to southwest to her sister's. We banged on the door around there for about a half an hour trying to wake her mother's sister, or her husband, or a little girl to open the door. So we couldn't get anyone at the door.

So Bea asked me would I bring her back to her home. I told her I would. So I brought her back to 937 and she asked me, she says, "Are you going home from there?" I told her I was. She said, "Will you drop this girl off?" She lives at 15th and S. Well, I live at 15th and U, so I told her I would.

So after I helps Bea up the steps, and the little girl, this girl comes out and gets in the car. So I takes her over -- I was going home from there.

She asked me did I have anything to drink and I told her I did not, not at that time. So she asked me did I know any place we could get a drink. I told her, well, there was a store in Maryland was open, but I had to go and pick my wife up. She told me if I would drive her where we could get some whisky that she would pay for it. At the time I had no money, so I told her I would take her out Sheriff Road in Maryland to get some whisky. So we went to Sheriff Road and she bought a pint of Hill & Hill (101) whisky at Dick's Stockade. And we drove out about four or five blocks out from the Stockade out into Maryland. So I told her, I said, "I got to go over and pick my wife up." I said, "Now, you got your whisky," She said, "O.K., drop me off at the house." I said, "O.K."

So we came back into Washington. I takes her home to 15th and S. And she asks me in to have a drink. Well, anyone knows I drink very little -- in fact, I drink once or twice a year. So I told her I still had to go and see about the kids, and she told me it would only take a moment. So I went in with her.

And I was in -- she went in the kitchen -- I was in the kitchen behind her and she asked me to have something to eat and I told her I had eaten already. So she told me, she said, "Well, you can go ahead and open the whiskey."

I did. I broke the seal on the whiskey and had dumped about this much (indicating) in a water glass when a loud knock came on the door.

I asked, I said, "Who is that?" She said, "Just be quiet and he will go away." (101)

So, about five seconds after that someone kicked the door in and the door bangs open. Well, I was sitting at this time. We came back in here -- I think it is her sleeping room -- and I was sitting down on the bed fixing to take my drink. I jumps up off of the bed. I says, "Who is that?" She said to be quiet, and she said, "I will see what they want." (102)

They was coming on in, Cherry, Dorothy, and this other fellow. I never seen him before, this fellow, for that matter, until that night.

So they came in. I reached and got my hat behind the door. I said, "Well, I will see you, Mary," and I started out.

This fellow and his companion asked me, he said, "What is your hurry, fellow?" I told him, I said, "Well, I was just leaving anyway."

He said, "Ain't no use leaving now." So this girl here, she smacked me, Dorothy -- she smacked me on the side of the head and said, "What are you doing in here with a friend of mine?"

I told her, "Well, the girl offered me in for a drink. I came in to take a drink. I was just leaving."

This fellow says, "No, you are not leaving yet."

I says, "Well, why can't I leave?"

He says, "Well, we just got here. Let's have some fun."

So he pulls a half gallon jar of corn whisky from under his coat and sits it on the table and said, "Go ahead and have a drink." I told him no, I had drunk some repeal whisky which I had there on the table. I said I wouldn't want to cross it up. I can't drink very much anyway. (103)

So he said, "No, go ahead. It is here now. You might as well drink some." So he kicks his shoes off. He says, "After all, I live here." I said, "Well, I am sorry, you know. After all, the girl offered me a drink and I came in for the drink."

He says, "Well, while you are here you might as well stay and have a drink."

I told him no, I didn't want to, myself.

The man said, the other fellow, this tall fellow -- he was taller than this fellow -- he says, "What is the matter? You think you are too good to drink with us fellows?"

I said, "No, it is not that. I just don't want corn whisky."

So then I started away and said, "I got an appointment to pick (103) my wife up."

He said, "You should have made that before you stopped in here."

So, anyway, I started to walk to the door again. This fellow blocked my path.

So, at this time, I figured this girl, Dorothy, had kind of simmered down, but she jumps in a rage again and asked me why didn't I buy the baby a doll for Christmas. I told her money ran short and I couldn't buy her a doll.

So she said I was there in bed with this girl, and she hit me (104) again. So I pushes her and she sits down on the bed.

This other fellow steps in and asks me what did I think I was doing. I told him I was just trying to get out of there. He said, "You should have thought of that before you came in."

And this fellow, Cherry -- at this time him and I hadn't had no kind of an argument whatever. He said, "Go ahead, man, drink some whisky."

I said, "No, I don't want no whisky."

He said, "Aint no use in heading it off."

I told him I had to go.

Now, when I pushed this girl Dorothy back, she sits down on the bed. Well, this tall fellow, he moves into me. He says, "What you think you are doing?" And he throws a punch. I ducks it and he grabs me -- the tall one grabbed me and snatched all the arm out of my overcoat. We was tussling around. So I see this fellow with an object in his hand -- at this time I didn't know he had a gun -- didn't know there was a gun in their possession. And he tries to hit me with this thing.

Sp by me -- I am larger than this other fellow with him -- I backs up just enough until the gun brushes by -- it didn't hit me. So this tall fellow turns me -- takes his arm from around here and spins me around. So when I spin around, I see this man with a gun in his hand, a big gun.

So he says, "I am going to kill you." I grabbed the gun and I told (105) him, "What did I do to you, man?"

He said, "You coming in here trying to take over where I pay rent."

I said, "I didn't know you pay rent here. I was just leaving." I said, "Just give me a chance to get out the door and I will go."

He said, "No, you aint going nowhere now."

And all the time this tall fellow was trying to pull me loose from this

fellow. I still had his wrist. I can't tell exactly how I had his (105) wrist, but I had a pretty good grip on his wrist.

So we was tussling up toward the front door and when I pulled down on this hand real hard, the gun discharged. The stuff slammed me all in the face, but I never let go his hand, and this fellow here said, "I am shot."

I said, "Well, let go of the gun then." Well, he was collapsing. I had his hand and he was collapsing. He said, "I am shot."

I said, "Well, let go of the gun."

Well, about that time this tall fellow -- I couldn't keep my eye on him too -- well, I saw him kind of out the corner of my eye and he was moving toward the door.

This girl here, Mary, she was all the way back in the kitchen. Dorothy, she was -- this is the kitchen (indicating), the sleeping room (106) (indicating), and then the front room (indicating), and she was in the room next to the one where we was drinking.

And about that time both of those girls ran out and they said, "What happened?"

And about that time Cherry released his grip on the gun and fell to the floor and the gun discharged again.

So he said, "My leg."

I said, [redacted]

He said, "I am shot."

I said, "You are not shot," -- just like that. So he says, "Yes, I am." And I happened to glance down I saw the stains coming out under his dungarees, overalls, so I just laid the gun down on the floor and reached to grab him and this girl said, "What are you going to do?"

I said, "I am going to take him to the hospital. The man is shot. It looks like to me he is shot."

She said, "Well, O.K."

So I reaches down and picks him up and walks out of the house with him in my arms.

He said, "Watch my leg, my leg where the bullet hit." I said, "O.K." So I had the leg where it had been shot turned up towards the ceiling. I was walking out to take him to my car to take him to the hospital. Just as I came out of the basement and up on the curb, I was walking to the curb

to step down when the scout car pulls into the curb right by my foot, (107) and an officer in uniform jumps out and says, "What is going on here? We got a report on some shooting."

He said, "This fellow has been shot?" I said, "Yes, sir."

"Well, who shot you, fellow?"

This fellow here told the officer at that time, he said, "I don't know."

So he asked Dorothy, "Who shot this fellow?" She says, "I don't know."

So the officer said, "Put him in the scout car." So I lifted him in the back seat of the scout car and backed up from the car so we could shut the door. And another scout car pulled up to the curb in front of this scout car, and they jumps out and says, "What is wrong?"

Two officers ran down in the basement. I was still standing by the police car when this girl, Mary, comes out of the basement. Now, at this time I did not see Officer Valentine. I wouldn't say he wasn't there, but I did not see him at this time and I don't remember seeing him until I got -- I think it was to No. 3 Precinct where they had taken me.

So she comes out of the basement and says, "That man there shot him," And the officers grabbed me, and from then they had taken me to the patrol wagon -- about four or five of them -- and they said, "Get in the wagon." I got up in the patrol wagon and this fellow, Randolph -- I guess that is his name -- was there, and he was peeking in the little side window in the (108) patrol wagon. He was peeking in there at me. So I said, "Fellow, tell these people what happened, will you?" He said, "Man, I ain't got nothing to do with it." And he moved back from the patrol wagon.

This girl, Dorothy, came up to the patrol wagon and said, "Mary told the people that you shot Cherry."

I said, "Well, you tell the people better."

I said, "I don't know where they are going to take me, but you tell the people how the thing happened."

So they had taken me on in to the precinct -- I don't know exactly what time it was that morning -- anyway, they had taken me in the precinct and they locked me up in a cell. I couldn't say exactly what time it was, but it was just before daybreak. They brought me out of the cell block, this officer here, and takes me up on the second floor and sits me down at a desk. Those two guns there was laying on the desk.

He told me, he says, "Well, we got the guns." I said, "Yes," I said, "you should have gotten them." I said, "I didn't try to do away with the gun or

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nothing." He said, "Yes." He said, "It was two guns." He said, "Both (108)
of them are yours?" I told him, I said, "No, sir." I said I had a gun and
he said, "What kind of a gun did you have?" I told him I had a 32. He said,
"Well, where was that gun?" Well, I told him it was in the glove (109)
compartment of my automobile. It wouldn't shoot. I said, "It is no good."

I gave the fellow ten dollars for it -- you know, I got a couple of fellows -- you know when you work down there and by me being foreman, they always pawn things to me until they pay me back, so he asked me if I would let him hold ten dollars on that thing and I told him yes. I threw it up in my glove compartment.

So when this officer here questioned me that morning, he told me that they found two guns, he says, and, "I found them on the bumper of your automobile."

He said, "You do own an automobile?" I said, "Yes." He said, "Well, what kind of an automobile do you own?" I showed him a registration card to my automobile. And he said, "Well, we found the guns and found them on the bumper of your car."

I said, "Well, I don't know how those guns got on the bumper of my car."

He said, "Well, do you want to make a statement?" I told him, "No, sir, no more than what I am telling you now."

He said, "Well, do you want to tell me how the shooting occurred?" I said, "Yes."

I started to tell him how the shooting occurred. He told me, he said. "You are a liar." He said, "There is no use saying more." He said, "You are going to jail for it."

I told him, "Well, I might probably go to jail, but I am going to (110)
tell the truth about the whole thing."

So he told the fellow to take me back and look me up. So he locked me up and brought me back to headquarters and put me in the line-up with two or three people.

The Assignment Squad and the Homicide Squad, they said they wanted to ask me questions. So they questioned me both in court and they locked me up at the arraignment -- had taken me on out of District Jail.

Q One minute, Mr. Austin. When you were referring to Dorothy saying something about getting a gift for the baby for what baby?

A Well, she had -- let me see how old is it -- she has a little daughter about, I would say, 5 years old. She says it is my kid, you see,

but it is not because I only met Dorothy in 1953, and at that time this (110) baby was about, I would say, a year or two old. She was a big girl then.

Q She insisted it was your baby?

A Yes, sir.

Q Is that the reason that she slapped you when she found you in the apartment with Mary Judkins? What did she say the reason was at that time, or did she say?

A She just accused me of being there and in bed with this girl.

Q Were you?

A No, sir; I still had my overcoat on. I hadn't even taken it (111) off. I had just taken off my hat, as I always do when I enter anybody's house; I takes my hat off. I layed it on the dresser, see.

So further than that, I was fully clothed, all but my hat.

Q Government's Exhibit No. 2, the 45 calibre pistol; did you ever see that automatic pistol before it was pointed at you by Corporal Cherry?

A No, sir.

Q Could you tell me, if you know -- and I am not sure that you do -- if this man Thomas, or Tompkins, or whatever his name is -- was he present when you were carrying Cherry out to the street?

A Yes, sir; he was present when I picked Cherry up. He was present.

Q He was present?

A Yes, sir.

Q Immediately after Corporal Cherry was wounded, did you carry (112) him out?

A Yes, sir.

Q Did you have him in your arms at all times?

A I picked him up on the spot -- started out the door -- I started to walk out, but the girl said, "That man is shot." So I turned and looked and I saw the blood on his dungarees. So I went back and picks him up, and from then until the time the officers got me, I was bringing Cherry up out of the basement in my arms and had him at the curb when the police car (113) pulled up.

Q In other words, you yourself never had any opportunity to go back to your car and then come back to the scene?

A No, sir; I never even left the building.

Q You never left the building?

A No, sir.

Q Except to take him out? (113)

A Except to walk up to the curb with him in my arms.

CROSS EXAMINATION (114)

BY MR. DONEGAN:

Q Did you hear them say that you were there and you exhibited (118) two pistols to Dorothy's mother and the woman in the front apartment, and some kids looked at them?

A Yes, sir; I heard them.

Q Did you do that?

A No, sir; I did not.

Q Did you hear Mary say that, in the automobile with you, you had those guns in your pockets?

A Yes, sir; I heard that.

Q Did you have the guns then?

A No, sir. This small gun was in the glove compartment of my automobile.

Q Not in your pocket?

A No, sir.

Q Now, in 1510 S Street, did you hear the testimony of Cherry, of Dorothy, and of Mary that you had an argument with Dorothy and (119) threatened to shoot her?

A Yes, sir; I heard that.

Q Did you have any such argument?

A I never threatened to harm her in my life.

Q Did you hear Cherry say that when he reached to hold your hand that had the civilian-type gun, which he later identifies as Exhibit 1?

A Yes, sir; I heard that one.

Q The 32 calibre, that it clicked at his head; did you hear his testimony?

A Yes, sir.

Q Did you hold this in one of your hands and did you pull on the trigger?

A That night?

Q That night.

A No, sir.

Q That night at 1510?

A No, sir! I did not.

Q Do you know how it is that one of these cartridges has been misfired? (119)

A Yes, sir.

Q All right, tell the jury.

A Why is it that they have?

Q That the bullet out of the 32 revolver had misfired.

A Yes, sir.

Q All right, when did it misfire? (120)

A When I got this gun from the fellow, which his name is Oscar Graham, he was working down at the job, the same job, when he gave me this gun. He told me that it wouldn't fire. So I had taken the gun out back and out at the garage and tested it. It didn't fire.

Q But you didn't have it in your hand at 1510 S Street next to Cherry and clicked it next to Cherry's head?

A No, sir.

Q Now, as I understand, you never had a 45 calibre semi-automatic in your hand that night, did you, according to your testimony?

A In my hand that night? That is right.

Q Did you hear the testimony of Detective Valentine that he asked Cherry who shot him, and he pointed to you and said, "That man." Did you hear the detective testify? (124)

A I heard the detective; yes, sir.

Q All right, do you recall now, after hearing the testimony of Cherry to that effect and the testimony of the detective, that that did take place?

A I heard their testimony.

Q Does it refresh your recollection so you can remember if it happened?

A My recollection, sir, is I don't remember seeing this officer until I was inside of Precinct No. 3. There wasn't anyone around me but uniform officers, and I don't know how many of those it was, but the patrol wagon was there and two scout cars. I didn't see the detective's automobile around, and I never seen this officer until I was inside of No. 3 Precinct.

Q You don't recall telling Detective Valentine, then, that Cherry would have to be crazy or something like that?

A I never told Officer Valentine that. I never told him that. I remember the things I said when this officer asked me did I shoot this man.

I told him no, I did not. I said, "The fellow will tell you." And (124-125) this uniformed officer also asked Cherry who shot him and he said he didn't know. He was in my arms at that time when he told this uniformed officer that he did not know.

And this girl also told the officer the same thing.

Q Are you the same Otis Austin, Jr., that was convicted of unlawful entry in 1951?

A Yes, sir; I am.

Q The same person by that name who was convicted in the same year of grand larceny of an automobile?

A No, sir; not grand larceny of an automobile -- unauthorized use of an automobile.

Q Is it your final testimony that you never had an argument with Dorothy and threatened to shoot her, and was in the act of holding a gun on her when Cherry grabbed your hand?

A My final statement is that I never threatened her with a gun in my life; in fact, no one.

Q Do you have a license to carry a gun in the District of Columbia?

A No, sir.

MR. DONEGAN: Nothing further, Your Honor.

REDIRECT EXAMINATION

BY MR. NEALON:

Q Were you carrying a gun in the District of Columbia?

A Well, sir, as far as on my person --

Q Carrying a gun on your person or about your person? Were you (126) ever carrying a gun?

A No, sir; no more than the 32 in the glove compartment of my automobile.

Q Not on your person?

A That is the only place I ever carried that in my life.

OPENING ARGUMENTS ON BEHALF OF UNITED STATES (129)

MR. DONEGAN: As you learned originally on voir dire and then through the opening statement which I made, the defendant here is charged with two offenses. The first is that known as an assault with a deadly weapon. The indictment recites that on or about January 24, 1956, within the District of Columbia, Otis Austin, this defendant, otherwise known as Otis Alston, made

an assault on Theodore Cherry, Jr., with a dangerous weapon; that is, (129)
a loaded pistol.

Now, the second charge is that on or about January 24, 1956, (130)
within the District of Columbia, the defendant here did carry openly or concealed on or about his person a dangerous weapon, that is, a pistol, without a license having been issued as provided by law.

And, as you know, when the evidence came out in this trial -- (133-134)
and I think it is a very important fact of evidence -- there were recovered five shells that went in this revolver. And, as the testimony disclosed, one of the shells had a dented cap that had not fired, and that is precisely what results when you fire a trigger and a gun clicks, if there is a bullet in the chamber.

Now, when the defendant got around to testifying, we heard something about, "I gave a man some money to hold the gun and I went out and tried the gun, and the man told me it wouldn't fire, and I pulled it and it didn't fire."

Well, you judge whether that is a truthful statement as to how one of those bullets is indented, or whether Cherry, Jr., told the truth that that gun was by his head when he was holding it and when it clicked at 1510 S Street, N. W.

Now, we have in evidence, stipulated by counsel, from Captain (136)
Slominsky, through Acting Chief of Police Howard B. Covell, they searched the records and there is no license for Otis Austin or Otis Alston for carrying any pistol in the District of Columbia. And there is no (137)
contradiction about it. His testimony alone is that he is guilty of the second count. He says he took his .38 out, according to his story, but somebody else had the .45, Cherry.

The man is guilty, on his own testimony, as to the second count of this indictment. The only thing left for you is whether or not he assaulted with a gun Cherry, Jr., on January 24, 1956, in the District of Columbia.

I am confident that your verdict on these facts will be that of guilty.

ARGUMENT ON BEHALF OF DEFENDANT

MR. NEALON: Ladies and gentlemen of the jury, you have listened to one version of this incident and now we are entitled that you listen to ours.

This man was arrested on January 24, and that is nine months ago, nine months. He spent nine months in jail already for something he didn't do.

The Government has not proved by any stretch of the imagination (137) a clear-cut case against this man. As a matter of fact, the District Attorney completely ignores the fact that there is another person involved in this affray, a man named Thompson, who was along.

Cherry was going around with Mary Judkins. He was told that the (139) defendant was at the apartment with Mary. He forced the door in and then by restraint upon this man with the aid of another party, who isn't here, Thompson, or never was during the trial, he is out in California -- is it too much to ask the Government, when they intended to put a man away, to bring a man in from California? That isn't anything. It is California. It is 4,000 miles -- that is all, at the most.

As to this man Thompson, would it be too much of an imposition (143) on the Government -- you know in many cases they bring people from overseas to prove a man's guilt or attempt to prove a man's guilt. Would it have been too much--they knew where he lived. In fact, his address and street number was given here. The address and street number was given. No attempt was made to get Thompson. No, because he might have been the man that put that gun or those guns on this man's car; a pretty slippery crowd, I would say.

Now, the District Attorney has made a lot out of that permit. (146) These guns were never proved to be in the possession. Read the indictment. He read it to you. I don't have to. This says, "Permit to carry a gun." Where was any proof offered that Otis Austin had this gun on him?

You either believe Otis Austin, the man who is telling the truth, or you believe the liars who have good motive to lie, very good motive to lie.

He never carried it and, is it a good story? This civilian gun, you see -- the man was a foreman of a car wash. He has boys working for him. The guy has a gun. He advances him ten dollars. He puts the gun in the glove compartment of his own car. He isn't carrying the gun.

Now, read the indictment. It says on that second count carrying a deadly weapon. He never carried it, and it was never proved he carried a deadly weapon, never.

Thompson isn't here. He was never subject to any direct examination (148) by the Government or corss examination by myself, never. He is not here. But they know his address in California. What did they do? They didn't bother to get him, but he is a material witness.

MR. DONEGAN: Now, we come to this witness Thompson. When I first heard (150) of him -- and you heard the testimony of the witness -- I am not testifying in my argument before you -- I asked Dorothy Jackson on redirect examination, after cross examination of defense lawyer found that Thompson was not here, and she told me he went to California, and gave the same address she gave at the trial; that is, the one she gave to me in Hayward, California. Never think that I would not have had that witness here if in my judgment he was a necessary witness.

I asked Dorothy Jackson -- and the same thing at this trial came in (151) the testimony -- was Thompson there when this struggle and shooting took place, and her testimony and that of other witnesses is no; that that boy took off when he saw those two guns in Otis Austin's hands; that that fellow wasn't there: that he didn't see the struggle that took place before the shooting; and that he didn't know who fired what gun or how it happened. That is the reason that he wasn't brought here to be a witness, because we seriously take our obligation in each and every trial to produce before the jury and the Court any witness who can shed light on these matters.

We are not vouching that they are smart people in this case. We are not saying they are the best people in the area. But we will say that they are the people who have knowledge that relates to a crime, and they will be the witnesses if they possess that knowledge.

Now, Thompson did not have an eye-witness' knowledge. All he would say is everybody had been drinking earlier in the night and there had been some argument. You get the same thing out of the defendant.

MR. DONEGAN: Thank you, Your Honor.

Ladies and gentlemen, based upon the facts that have been produced in evidence -- and I want to again stress I understood this defendant to say he took out his .38 when Cherry had a .45 and was striking at him with it -- that is what I understood Austin to say -- Cherry striking at him with a .45, not pulling it but hitting at him with it, and that is when he took out his .38. Any time any man has a weapon reasonably where he can get (154) a hold of it, he is carrying it, and His Honor will instruct you as to the law on that point. If a man sits in an automobile and in the glove compartment there is a gun, he is guilty of carrying a gun. Why? Because he can reach that gun almost instantaneously. Certainly, any man that says, "Then I took out my gun," is carrying one.

So on his testimony I can see absolutely no question for you. The (154) Government witnesses and the defendant both agree on the second count, carrying a dangerous weapon. On the first count, I think the evidence overwhelmingly points that he was properly chargeable of being guilty beyond a reasonable doubt. Thank you.

JURY CHARGE

THE COURT: (Laws, J.): Members of the jury, as you have come to know, it is the duty of the Judge at this stage of each case to instruct the jury as to the law which controls, and leave to the jury the determination of the facts.

The indictment, as you also know, is a written charge which informs the defendant of the nature of the charges with which he is concerned and that he must answer.

Sometimes the indictment, the written charge, contains one charge of wrongdoing and sometimes it contains more. If it contains more, each charge is called a count.

Now, there are two charges in this indictment. The first is called (155) the first count of the indictment. It is a charge of assault with a dangerous weapon. The second charge is carrying a dangerous weapon on the person of the defendant.

Now, an assault is committed where one makes an unlawful offer of violence against another, that is, to say without any legal provocation he makes an offer of violence toward another. It does not necessarily mean he must strike the other or cause the other injury. It is the offer of violence.

Now, if he commits such an act and does so with a weapon that is capable of bringing about serious bodily injury or death, then it is a dangerous weapon.

The Government in this instance charges that this defendant on or about January 24, 1956, did make an unlawful offer of violence against Theodore R. Cherry, Jr. with a dangerous weapon consisting of a pistol. That is the position of the Government, which of course is denied by the defendant.

Now, as I understand the testimony of the Government and the position taken by the prosecutor, it is that this defendant, after exhibiting two pistols at one place, later had them at a different place when Theodore Cherry and others came to that other place, and that while some altercation was going on between the woman, and Austin became involved in it to (156) extent, he threatened to shoot one of the women, which, if true, would be

unprovoked; that later he actually did undertake to shoot one of the (156)
women, whereupon Cherry reached up his hand and warded off the shot; and later in the shooting Cherry was hurt.

Now, if such an unlawful offer of violence as that was made, and Cherry was struck by the bullet, and it was made with a gun held in the hand of the defendant, then he would be guilty of that charge.

The defendant, on the other hand, denies that he made an unlawful offer of violence. He denies that he had either of the guns at M Street, or either of them at the other place. He maintains that the .45 calibre gun was not his, was not in his possession; that in the course of the evening it developed that he was set upon and that an offer of violence was made toward him, and that in trying to wrest the gun away from Cherry who made the offer of violence, it fell to the floor and went off and struck Cherry.

Now, that would be what you would call an accidental shooting in the course of defending himself. In other words, a person, when his safety is threatened or he, as a reasonable person, judges himself in danger, has the right, the legal right, to repel that offer of violence by such force as under the circumstances he feels is reasonably proper to exercise or necessary to exercise. And if in defending himself there comes about (157)
an accidental shooting, why then he would not be guilty of any offense. That is the position taken by the defendant in respect of this first count or first charge, which is set forth in the indictment.

Now the second charge which you are concerned with and with respect to which you are asked to give a verdict as to the facts, is that on or about this same time on January 24, this defendant, Austin, did carry openly and concealed on or about his person a pistol without having a license.

Under the statute under our law, if any person carries a gun on or about his person, either openly or concealed and he does not have a license to do so, he would be guilty of a crime. The position of the Government is this man, as we have already stated, had the guns on his person at both of these places; that it is admitted by all, or stipulated by all, that he did not have a license to carry one; and based upon that, the Government maintains that this defendant was guilty in that he had both of them or either one of them on his person either at M Street or 1510 S Street.

If he had either one of them on his person at those places, since it is stipulated he did not have a license, he would be guilty of that count.

Now, the defendants meets it and he argues in his defense that he (157) did not have even one of them at those two places. He did say that he had this revolver, this steelbarrel revolver, the .32 I think it was, in (158) the glove compartment of his automobile. As I gathered, his contention was that the glove compartment was closed.

Now, it is true in some instances that if a man carries a gun within ready reach of his person, that is under the complete dominion of his person, it would be considered on his person. However, I instruct you as a matter of law that if you believe that this was in his glove compartment on this occasion, and that glove compartment was close up, that would be a defense to this charge.

The Government's position, of course, is that he had it on his person and in his hand at 937 M Street, and at the S Street property. If you do find that, then you would find him guilty of the second charge.

Now, in respect of these charges, you bear in mind that in every criminal case, and of course in this case, the defendant starts the trial with a presumption of innocence. Under our law we presume that our citizens do not as a rule commit crimes or do wrongs. When some allegation of wrong is made, then the burden is on the Government or the prosecutor to establish guilt beyond a reasonable doubt.

If you have no doubt as to guilt, of course you do not have any trouble. If you have only a doubt that rises in your minds and leaves after you reason with it and discuss it among yourselves, if that is the only type of doubt of guilt you have, then it is not a reasonable doubt and you (159) would still find the defendant guilty. But sometimes we find doubts arise in our minds and after we reason with them and talk them over with others who have the same information we have, we find that doubt stays with us and makes us hesitate or pause in making up our minds. If you have that type of doubt in respect of either of these charges, or any element going to make up the charges, then your verdict would be not guilty. Of course, if you have no doubt whatever as to his innocence, you would find him not guilty.

That is the approach you make in every criminal case. It is the duty of the Judge to remind you of that every time you try a case, and you make that approach of course in this case.

Now, there is one more item that has already been called to your attention in respect to which it is my duty to charge you, and that is that this

defendant admitted on questioning by the District Attorney that he had (159) a previous criminal record. That is not any evidence of guilt in this case. I think your reasoning would indicate why. If we just picked those who had previous records and convicted them on the fact that they had a previous record, why then a good many innocent people might be convicted.

However, it is proper in any case to bring out a previous criminal record on the part of any witness, any person that takes the stand, in (160) order to test the credibility of the witness.

Jurors might say that even though he had a record, I believe he is telling the truth now. On the other hand, you might say that with a criminal record, and other people who testified not having a criminal record, why we think that he is unworthy of belief. Now, you have the right to consider that in this case in any way you think proper, so long as you do not convict him of these charges simply because he had a previous record. The testimony is permitted only in order that you may see whether it affects his credibility as a witness or not. That is the way you deal with it every time you hear the matter of a criminal record brought out in respect of a defendant who appears as a witness in his own behalf.

I think I have covered the other elements of these charges.

In making up your minds concerning the cases that you hear in criminal court, you follow the line of reasoning that you would follow to make up your minds in regard to any important matter arising in your daily lives. If you had a problem of this type out in your daily business lives, you would consider the witnesses, how they impressed you, their manner, what you would regard as motives to testify one way or the other. You would take into consideration the lines of testimony that you thought were (161) reasonable and those that were not reasonable, those that were truthful and those that were not truthful. Having done that and made that type of an approach in respect to all the witnesses on both sides, if you have no reasonable doubt as to the guilt, of course you find a verdict of guilty. If you have a reasonable doubt, then you render a verdict of not guilty.

Do you have anything further, Mr. Donegan?

MR. DONEGAN: Nothing, Your Honor.

THE COURT: Do you?

MR. NEALON: Nothing, Your Honor.

THE COURT: You may take the case and select a foreman and try to agree on a unanimous verdict.

(Thereupon, at 11:40 a.m., the jury retired to deliberate its verdict.)

---oooOooo---

FILED IN OPEN COURT (163)
MAY 28 1956
HARRY M. HULL, Clerk

The United States of America :
:
v. :
:
Otis Austin :
otherwise known as :
Otis Alston :
:

Criminal No. 548-56
Grand Jury No. 694-56
Assault with a Dangerous Weapon
Carrying a Dangerous Weapon
(22 D.C.C. 502, 3204)

The Grand Jury charges:

On or about January 24, 1956, within the District of Columbia, Otis Austin, otherwise known as Otis Alston, made an assault on Theodore R. Cherry, Jr., with a dangerous weapon, that is, a loaded pistol.

SECOND COUNT:

On or about January 24, 1956, within the District of Columbia, Otis Austin, otherwise known as Otis Alston, did carry, openly and concealed on or about his person, a dangerous weapon, that is, a pistol without a license having been issued as provided by law.

FILED (164)
JUN 1 1956
HARRY M. HULL, Clerk

UNITED STATES

vs.

OTIS AUSTIN
Defendant

Criminal No. 548-56

Charge ADW and CDW

PLEA OF DEFENDANT

On this 1st day of June, 1956, the defendant Otis Austin, appearing in proper person and by his attorney without counsel present Wm. Donnelly for John Nealon, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of

RICHMOND B. KEECH

Presiding Judge

Criminal Court No. Three

FILED (165)
SEP 10 1956
HARRY M. HULL, Clerk

UNITED STATES :
vs. : Criminal No. 548-56
Otis Austin : Charge ADW; CDW
Defendant :

On this 10th day of September, 1956, came again the parties aforesaid, in manner as aforesaid, the same jury as aforesaid in this cause, the hearing of which was respited on Thursday, September 6, 1956; whereupon, after hearing the arguments of counsel and the charge of the Court, the jury upon their oath say that the defendant is Not Guilty on Count One and Guilty as Indicted on Count Two.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction
Bolitha J. Laws
Presiding Judge
Criminal Court No. One

United States of America :
v. : Criminal No. 548-56
Otis Austin, :
otherwise known as :
Otis Alston :

FILED (168)
OCT 6 1956
HARRY M. HULL, Clerk

On this 15th day of October, 1956 came the attorney for the government and the defendant appeared in person and[1] by counsel, John J. Nealon, Esquire

It is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of

Violation of Section 3204, Title 22, District of Columbia Code
as charged[2] in Count Two

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4]

Eighteen (18) months to Six (6) years

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Bolitha J. Laws
United States District Judge

FILED IN OPEN COURT (163)
MAY 28 1956
HARRY M. HULL, Clerk

The United States of America :
:
v. :
: Criminal No. 548-56
: Grand Jury No. 694-56
Otis Austin : Assault with a Dangerous Weapon
otherwise known as : Carrying a Dangerous Weapon
Otis Alston : (22 D.C.C. 502, 3204)
:

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SECOND COUNT:

On or about January 24, 1956, within the District of Columbia, Otis Austin, otherwise known as Otis Alston, did carry, openly and concealed on or about his person, a dangerous weapon, that is, a pistol without a license having been issued as provided by law.

FILED (164)
JUN 1 1956
HARRY M. HULL, Clerk

UNITED STATES

vs.

OTIS AUSTIN
Defendant

Criminal No. 548-56

Charge ADW and CDW

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The defendant is remanded to the District of Columbia Jail.

By direction of

RICHMOND B. KEECH

Presiding Judge

Criminal Court No. Three

FILED (165)
SEP 10 1956
HARRY M. HULL, Clerk

UNITED STATES :
vs. : Criminal No. 548-56
Otis Austin : Charge ADW; CDW
Defendant :

On this 10th day of September, 1956, came again the parties aforesaid, in manner as aforesaid, the same jury as aforesaid in this cause, the hearing of which was respited on Thursday, September 6, 1956; whereupon, after hearing the arguments of counsel and the charge of the Court, the jury upon their oath say that the defendant is Not Guilty on Count One and Guilty as Indicted on Count Two.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction
Bolitha J. Laws
Presiding Judge
Criminal Court No. One

United States of America :
v. : Criminal No. 548-56
Otis Austin, :
otherwise known as :
Otis Alston :

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Violation of Section 3204, Title 22, District of Columbia Code
as charged[2] in Count Two

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4]

Eighteen (18) months to Six (6) years

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Bolitha J. Laws
United States District Judge

FOR BINDING

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13853

OTIS AUSTIN A/K/A OTIS ALSTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.
LEWIS CARROLL,
FRED L. McINTYRE,
Assistant United States Attorneys.

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 28 1957

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

In the appellee's opinion the following questions are presented:

1. Whether the trial court's instruction when construed as a whole set forth an adequate statement of the law pertaining to the charge of carrying a dangerous weapon.

2. Whether absence of witness can be complained about where no effort to subpoena witness in lower court, and record infers testimony of witness would be cumulative.

430933—57——1

INDEX

	Page
Counterstatement of the case	1
Statute involved	5
Summary of argument	6
Argument:	
I. The trial court's instruction when construed as a whole adequately sets forth an adequate statement of the law	6
II. Appellant did not move for the compulsory process of a witness in the court below; consequently he is foreclosed from complaining about his absence on appeal	13
Conclusion	14

TABLE OF CASES

Boyd v. *United States*, 46 S. Ct. 422, 271 U. S. 104, 70 L. Ed. 857	7
Graham v. *United States*, 88 U. S. App. D. C. 129, (1950), 187 F. 2d 87, *cert. denied*, 71 S. Ct. 741, 341 U. S. 920, 95 L. Ed. 1353	7
Kinard v. *United States*, 69 App. D. C. 322, 101 F. 2d 246 (1938)	7
Lehman v. *District of Columbia*, 19 App. D. C. 217, (1902)	7
Moffitt v. *United States*, 154 F. 2d 402, *cert. denied*, 66 S. Ct. 1343, 328 U. S. 853, 90 L. Ed. 1625	7
Morton v. *United States*, 79 U. S. App. D. C. 329, 147 F. 2d 28 (1945)	13
Schaefer v. *United States*, 251 U. S. 466, 40 S. Ct. 259, 64 L. Ed. 360	7
Sullivan v. *District of Columbia*, 20 App. D. C. 29 (1902)	7
Taylor v. *United States*, 142 F. 2d 808, *cert. denied*, 65 S. Ct. 56, 323 U. S. 723, 89 L. Ed. 581	7
United States v. *Carruthers*, 152 F. 2d 512, *cert. denied*, 66 S. Ct. 805, 327 U. S. 787, 90 L. Ed. 1014 (1946)	7
United States v. *Paccione*, 224 F. 2d 801 (2nd Cir. 1955)	13
Villaroman v. *United States*, 87 U. S. App. D. C. 240 (1950)	12
Word v. *United States*, 199 F. 2d 801 (2nd Cir. 1955)	13

OTHER REFERENCES

22 D. C. C. § 502, § 3204	5
Federal Rules of Criminal Procedure, Rule 51 and 17 (b)	13

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13853

OTIS AUSTIN A/K/A OTIS ALSTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Otis Austin was indicted in a two count indictment for the offenses of assault with a dangerous weapon, and carrying a dangerous weapon (22 D. C. C. § 502, § 3204) (J. A. 40).

On September 10, 1956, the jury returned a verdict finding appellant guilty of count two which alleged carrying a dangerous weapon. He was found not guilty of the charge alleging an assault with a dangerous weapon (J. A. 41).

In a judgment and commitment order filed October 16, 1956, appellant was sentenced to a term of imprisonment of from eighteen months to six years (J. A. 41). Appellant now appeals in forma pauperis from his conviction in the lower court.

Theodore R. Cherry Jr., automotive mechanic stationed at Bolling Air Force Base testified that on January 24, 1956 at about midnight he and two friends went to the home of Mary Judkins (J. A. 1). Upon their arrival one of his companions

kicked the front door of Judkin's apartment. Once inside they observed appellant and Mary Judkin together in one room of the apartment. At this point Dorothy Jackson, who had accompanied Cherry to the apartment ran outside. She was followed by appellant. A short time later appellant returned to the room and he had two guns holding them in a raised 45 degree angle (J. A. 2). Upon his return to the room appellant proceeded to threaten Dorothy Jackson on several occasions with the guns. On another occasion he struck her in the face knocking her to the floor (J. A. 3). Theodore Cherry thereafter related that appellant pointed a pistol, later identified as a .32 cal., to his face. Cherry stated he heard something click. He grabbed at the pistol knocking it to the floor and appellant grabbed for the 45 automatic that was stuck in his belt. Cherry then stated that he placed both hands on the 45 automatic to keep appellant from firing it. After a few minutes Cherry released his hold from the gun and backed away from the appellant, when appellant stated that he would not shoot him (J. A. 4).

About this time Dorothy Jackson screamed at appellant, "If it hadn't been for that no-good Mary, you would never hit me." It was then that Cherry stated that the .45 cal. automatic that appellant was holding went off hitting him in the leg and fracturing the femur bone in his left leg.

Mary E. Judkins, residing at 1321 R Street Northeast, District of Columbia, testified that on January 24 at about 12: 30 a. m. she and appellant were together at her apartment. Presently Theodore Cherry, Dorothy Jackson and another male person came to her apartment (J. A. 14). Once there an argument commenced between Dorothy Jackson and appellant. The appellant was armed with two pistols and on two or three occasions he pointed them at Dorothy Jackson (J. A. 14).

During the course of the argument Theodore Cherry went up to the appellant and told him not to shoot Dorothy Jackson. While he was next to appellant a shot from the 45 cal. went off striking Cherry in the left leg. Upon being struck Cherry proceeded to leave the apartment. Mary Judkins testified that she did not go outside at this time but waited until the police arrived. At that time she took the officers to ap-

pellant's car where two guns were found on the rear bumper of appellant's car (J. A. 15). These were the same two guns that appellant had had in the apartment a short time before.

On cross-examination Mary Judkins testified that appellant was at 937 M Street, earlier in the evening and that he had displayed the 45 cal. automatic to several people. (J. A. 15.) Later that same evening she returned to her apartment with appellant and that she was with him there until the shooting occurred at about 12: 30 a. m.

On redirect examination Mary Judkins testified that appellant drew the gun on Dorothy Jackson, and that she (Jackson) turned her back on the appellant. She then told appellant if he shot to shoot her in the back. It was then that Cherry approached appellant and told him not to do that.

At this time the gun that appellant was holding went off and the bullet struck Cherry in the leg.

Dorothy Jackson residing at 937 M Street Northwest, in the District of Columbia testified that on January 24, 1956, she saw appellant at the above address. It was about 9 o'clock and appellant proceeded to display two guns to her mother and another woman that resided at this address. At about 11: 30 appellant left these premises. Dorothy Jackson stated that she did not see him again until she visited Mary Judkin's apartment later that same evening. Dorothy Jackson related that Theodore Cherry and Randolph Thompson accompanied her to the apartment. Once there she proceeded to have an argument with appellant. He struck her in the face knocking her to the floor (J. A. 7). Shortly thereafter Theodore Cherry approached appellant and he (appellant) stated at that time, "he was the biggest because he was the man behind the guns." (J. A. 7).

After this occurred Dorothy Jackson stated that she commenced to argue with appellant and he announced that he was going to kill her. She turned her back on appellant, and Theodore Cherry ran into the room and hit the gun appellant was holding in his hand. A shot from the gun went off striking Cherry in the leg (J. A. 8). After that Cherry and appellant proceeded outside. Once there appellant proceeded to stand over Cherry, and stated that if he didn't get up by

the time he counted to ten he would kill him. After this Cherry proceeded to crawl down the steps to a position under a car parked at the curb. (J. A. 8.)

Dorothy Jackson further testified that except for the two guns appellant had she did not see anyone else with a gun on that particular evening (J. A. 9). The witness was shown government exhibits one and two and she identified them as the guns that appellant had there in Mary Judkins apartment when appellant shot Theodore Cherry in the leg.

Detective Wallace Valentine assigned to the Robbery Squad of the Metropolitan Police Department testified that he investigated the shooting that occurred on January 24, 1956. He stated that in response to a radio call he responded to 1510 S Street NW., and observed appellant attempting to put Theodore Cherry in a police car. When asked who had shot him, Cherry pointed out appellant (J. A. 15–16).

Valentine related that he interrogated appellant at the precinct. Appellant stated that the 32 cal. pistol belonged to him, but that the 45 cal. automatic belonged to Cherry (J. A. 17). Appellant also told officer Valentine that Cherry was going to shoot him (appellant) with the 45 cal. automatic. After this appellant stated that he began to scuffle with Cherry and during the struggle the 45 cal. automatic that Cherry held in his hand went off, the bullet striking Cherry's leg.

Valentine stated that he searched the scene immediately after the shooting and found both guns on the rear bumper of the accused's car. A search of appellant's overcoat also revealed one 45 cal. bullet. A further search of appellant's car disclosed another 45 cal. bullet under the front seat. Valentine stated that the recovered 45 cal. automatic had three unfired rounds in the chamber. The officer was only able to find one empty 45 cartridge and that was recovered from inside Mary Judkins apartment (J. A. 18).

Valentine also testified concerning the 32 cal. pistol. He stated that the revolver was fully loaded when recovered from the rear bumper of appellant's automobile. He also testified that the firing pin had hit one of the cartridges, and it contained an impression from the pin (J. A. 17).

Otis Austin, appellant residing at 933 H Street SE., testified that he accompanied Mary Judkins to her apartment on the evening of January 24, 1956. After being there a short time Theodore Cherry, Dorothy Jackson and another male person came to the apartment (J. A. 24).

Appellant stated that he tried to leave as soon as these persons arrived. After a short time appellant stated an argument commenced between him and Dorothy Jackson. Appellant stated that he pushed her against the bed, and at that time Cherry came at him.

They became engaged in a struggle and Cherry stated that he was going to kill appellant. Appellant testified that he had hold of Cherry's arms and he jerked down real hard at which time the gun in Cherry's possession went off striking Cherry in the leg (J. A. 26). Upon being shot Cherry released the gun and it fell to the floor and discharged again. Appellant related that he looked down and saw blood coming from Cherry's leg. Upon seeing this appellant stated that he took Cherry in his arms and commenced carrying him to his car in order to drive him to the hospital. At this time the police officers approached. He was thereafter taken into custody by the officers.

STATUTE INVOLVED

Title 22, District of Columbia Code, Sec. 22–3204 provides:

> *Carrying concealed weapons.*—No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22–3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

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IMARY OF ARGUMENT

It is axiomatic that the charge to the jury must be considered as a whole. In the instant case the entire instruction when considered as a whole sets forth a legally sufficient charge. The charge as given by the court allowed the jury to find the accused guilty of carrying a dangerous weapon, to wit a pistol, if the jury believed he had possession of either the 45 cal. automatic or the 32 cal. pistol. The evidence adduced at trial made it clearly self evident that the 45 cal. automatic was capable of causing bodily harm. A shot was actually fired from this gun fracturing the bone in complainant's leg. The proof of appellant having possession of the 45 was proved beyond any peradventure of doubt. Three eye witnesses maintained that the 45 cal. automatic was in his possession, and such fact was corroborated by the physical evidence adduced at the trial. As to the 32 cal. pistol the evidence of appellant having possession was equally strong. The dangerous characteristics of this weapon were also readily apparent. The evidence revealed that the 32 cal. pistol was fully loaded, the firing pin was intact, and one of the shells in the chamber revealed a grooved imprint from the strike of the firing pin. From such evidence it would be unrealistic to conclude that the weapon was incapable of causing bodily harm.

In regard to the absent witness it is clear that appellant made no effort through the trial court to obtain this particular witness although he was known to the accused. See Rule 51, and 17 (b) of the Federal Rules of Criminal Procedure.

In any event the record discloses that no substantial harm was caused by this witness being absent. The record clearly infers that his testimony would have been cumulative to the evidence adduced at trial.

ARGUMENT

I

The trial court's instruction when construed as a whole adequately sets forth an adequate statement of the law

Appellant complains that the trial court erred in its charge to the jury. He contends that the instruction as given precluded the jury from finding appellant guilty unless the ac-

cused had the 32 cal. pistol on or about his person. This would appear to be to appellant's advantage. If what he says is true then the jury could not have found appellant guilty of the charge even though the accused had immediate possession of the 45 cal. automatic. We do not read the instruction so narrowly.

It is axiomatic that the charge to the jury must be considered as a whole. *Kinard* v. *United States,* 69 App. D. C. 322, 101 F. 2d 246 (1938); and the instruction is legally sufficient when the instruction construed as a whole sets forth fairly an adequate statement of the law, *Graham* v. *United States,* 88 U. S. App. D. C. 129 (1950), 187 F. 2d 87, *cert. denied* 71 S. Ct. 741, 341 U. S. 920, 95 L. Ed. 1353.[1]

In appellant's case the trial judge instructed the jury as follows (J. A. 36):

> THE COURT: (Laws J.): Members of the jury, as you have come to know, it is the duty of the Judge at this stage of each case to instruct the jury as to the law which controls, and leave to the jury the determination of the facts.
>
> * * * * *
>
> Now, there are two charges in this indictment. The first is called the first count of the indictment. It is a charge of assault with a dangerous weapon. *The second charge is carrying a dangerous weapon on the person of the defendant.*
>
> Now, as assault is committed where one makes an unlawful offer of violence against another, that is, to

[1] See also: *Schaefer* v. *United States,* 251 U. S. 466, 471, 40 S. Ct. 259, 64 L. Ed. 360; *Sullivan* v. *District of Columbia,* 20 App. D. C. 29, (1902); *Lehman* v. *District of Columbia,* 19 App. D. C. 217, (1902); *Boyd* v. *United States,* 46 S. Ct. 422, 271 U. S. 104, 70 L. Ed. 857. Portion of charge must be taken with what precedes and follows it.

United States v. *Carruthers,* 152 F. 2d 512, *cert. denied,* 66 S. Ct. 805, 327 U. S. 787, 90 L. Ed. 1014, 1946). Instructions should be construed as a whole, and, if not then misleading is not erroneous. The reviewing Court was not required to go further with respect to trial court's instructions than to determine that, considered as a whole, they properly submitted the cause to the jury, *Taylor* v. *United States,* 142 F. 2d 808, *cert. denied,* 65 S. Ct. 56, 323 U. S. 723, 89 L. Ed. 581; *Moffitt* v. *United States,* 154 F. 2d 402, *cert. denied,* 66 S. Ct. 1343, 328 U. S. 853, 90 L. Ed. 1625.

say without legal provocation he makes an offer of violence toward another. It does not necessarily mean he must strike the other or cause the other injury. It is offer of violence.

Now, if he commits such an act and does so with a weapon that is capable of bringing about bodily injury or death, then it is a dangerous weapon.

* * * * *

The Government in this instance charges that this defendant on or about January 24, 1956, did make an unlawful offer of violence against Theodore R. Cherry, Jr., *with a dangerous weapon consisting of a pistol.*

* * * * *

Now the second charge which you are concerned with and with respect to which you are asked to give a verdict as to the facts, is that on or about this same time on January 24, this defendant, Austin, did carry openly and concealed on or about his person a pistol without a license.

Under the statute under our law, if any person carries a gun on or about his person, either openly or concealed and does not have a license to do so, he would be guilty of a crime. The *position of the Government is this man, as we have already stated, had the guns on his person at both of these places; that it is admitted by all, or stipulated by all, that he did not have a license to carry one;* and based upon that, the Government maintains that this defendant was guilty in that he had both of them or either one of them on his person either at M Street or 1510 S Street.

If he had either one of them on his person at those places, since it is stipulated he did not have a license, he would be guilty of that count.

Now, the defendant meets it and he argues in his defense that he did not have even one of them at those two places. He did say that he had this revolver, this steelbarrel revolver, the .32 I think it was, in the glove compartment of his automobile. As I gathered, his contention was that the glove compartment was closed.

> Now, it is true in some instances that if a man carries a gun within ready reach of his person, that is under the complete dominion of his person, it would be considered on his person. *However, I instruct you as a matter of law that if you believe that this was in his glove compartment on this occasion, and that glove compartment was closed up, that would be a defense to this charge.*
>
> The Government's position, of course, is that he had it on his person and in his hand at 937 M Street, and at the S Street property. If you do find that, then you find him guilty of the second charge.

Thus from the entire scope of the trial court's instruction it is apparent that the court adequately instructed as to the charge alleged in count two of the indictment. At the outset of his instruction the trial judge informed the jury that the accused under the terms of the second count of the indictment was charged with "carrying a dangerous weapon on the person of the defendant." Shortly thereafter the court proceeded to define the term dangerous weapon as "a weapon that is capable of bringing about serious bodily injury or death—then it is a dangerous weapon."

In another part of the charge the court informed the jury that if any person carries a gun on or about his person, either openly or concealed and he does not have a license to do so, he would be guilty of the offense alleged in count two. The court acknowledged to the jury that a stipulation had been entered into between the parties to the effect that the accused did not have a license to carry a gun. Thereafter, the court indicated to the jury that they could find the accused guilty of the charge if it was concluded he was in possession of either gun. At this point the court departed from the general instruction and told the jury that the accused might have a defense as to the 32 cal. pistol. He explained such would be the case if it was concluded the 32 cal. was in the glove compartment of appellant's automobile.

Contrary to what appellant now asserts in the matter it is quite clear that this specific instruction did not restrict nor impair the import of the general instruction as given by the

court. Nor did it preclude the jury finding appellant guilty of the charge on the basis of the accused having possession of the 45 cal. automatic. As to this particular weapon the physical facts adduced at trial readily speak for its dangerous characteristics. In this regard the evidence at trial discloses that the complainant, Theodore Cherry, while wrestling with the accused struck the arm of the accused causing a "slug" to be discharged from the 45 cal. automatic that appellant was holding in his hand. The discharged bullet struck the complainant in the leg fracturing the femur bone. Appellant denied ownership and possession of the 45 cal. automatic. He contended that the gun was in the complainant's possession when it was discharged. Contrary to what appellant asserts in the matter the evidence against him was overwhelming. All the persons who were eye witnesses to the shooting testified that appellant had possession of the gun when the shooting occurred.[2] Moreover, Dorothy Jackson and Mary Judkins testified that appellant had the 45 cal. automatic in his possession about three hours before the shooting and that he displayed the gun in a room occupied by at least six persons. These same two witnesses, along with complainant related that appellant waved the gun in Dorothy Jackson's face and threatened her life on several occasions just prior to the actual shooting. In addition to what has already been related showing appellant had possession of the 45 cal. automatic the physical evidence adduced at the trial also corroborated his being in possession of the weapon. Officer Valentine investigated the shooting. He testified at the trial. His testimony disclosed that one fully loaded round of 45 cal. automatic ammunition was recovered from the overcoat of the accused, and still another shell was found under the front seat of the accused's automobile. He also related that both the 45 cal. automatic and the 32 cal. pistol within a short time of the shooting, were found on the rear bumper of the accused's automobile. Hence in view of this great weight of testimony

[2] Dorothy Jackson, Mary Judkins and the complainant testified that appellant had possession of the 45 cal. automatic. Another eye witness Randolph Thompson did not testify at the trial.

it seems only too clear that appellant was in possession of the 45 cal. automatic and the jury so properly concluded.

Even under appellant's view of the trial court's instruction the jury could have found appellant had possession of the 32 cal. pistol; and consequently he would be guilty of the carrying charge. In the instant record there is an abundance of evidence for the jury to have concluded that appellant had immediate possession of the 32 cal. pistol and that such weapon was capable of causing bodily harm. Although appellant contends otherwise the trial court sufficiently defined the meaning of dangerous weapon. This is clearly brought out by the instruction where the court stated to the jury that under the terms of the second count of the indictment the accused was charged with "carrying a dangerous weapon on the person of the defendant." From there the court proceeded to give a short but precise definition of the term dangerous weapon. In this regard the court said, "a weapon that is capable of bringing about serious bodily injury or death—then it is a dangerous weapon."

Thus from this portion of the instruction it seems quite apparent that the jurors knew that at the outset that they had to find the weapon—to wit a pistol—was capable of causing bodily harm before they could find the accused guilty of the carrying charge. The present record reveals that the evidence adduced at trial clearly supports a finding that the 32 cal. pistol was a weapon capable of causing bodily injury. Such can be readily inferred from the fact that the 32 cal. pistol was fully loaded and that the firing pin was still intact. In addition the physical evidence at trial showed that one of the shells in the chamber had a grooved marking caused by the firing pin. This shell was still intact and unfired. Moreover this testimony was supplemented by the testimony of the complainant. He related that appellant pointed the 32 cal. pistol at his face and he heard something click. Appellant admitted this in his interrogation with Officer Valentine. From this evidence it is not unreasonable to conclude that the 32 cal. pistol was apparently capable at any time of releasing a lethal charge.

In regard to the lethal capacity of the .32 cal. pistol appellant does not appear to be in a favorable position to complain. Such results from the fact that appellant at trial questioned Officer Valentine as to whether he had actually test fired the weapon. The officer replied that he had not, whereupon appellant requested the officer to pull the trigger of the gun and observe the action of the firing pin. In the interest of safety the trial judge halted the demonstration and informed counsel that he could have the weapon test first at the noon recess on the firing range. Although afforded this opportunity counsel never proceeded with a test firing of the gun. Evidently he realized that an actual firing would disclose the full lethal capacity of the weapon which the evidence at trial so reasonably inferred.

Finally, appellant at this posture of the proceedings should have no cause to complain about the trial court's instructions. He made no effort to amend or supplement the instructions as given by the trial court. To the contrary he acknowledged his satisfaction in the instruction as given.

Rule 30 of the Federal Rules of Criminal Procedure provides as follows:

> * * * No party may assign as error any portion of the charge or admission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.

In the case of *Villaroman* v. *United States,* 87 U. S. App. D. C. 240 (1950) this court reaffirmed the general policy set forth in Rule 30. In its Villaroman decision the court stated:

> In assigning error as to any part of a charge, or for any admission therefrom, as for failure to charge in accordance with a request, it is essential that a distinct objection be stated, with the ground upon which it is based. * * * The requirement is for the sound and practical purpose of affording the court an opportunity to make any additions or corrections that may be deemed appropriate before the jury retires to consider its verdict.

The instant case appears to come precisely within the general policy enounced in the Villaroman opinion. Admittedly there can always be refinement of the instruction to the jury. Of course this is not a responsibility of the trial court. The essential function of the trial forum is to substantially provide the jury with a charge defining the element of the crime with which the accused is charged. The record herein discloses as already discussed that this requirement was met, and accordingly the accused at this late date should have no cause to complain about the trial court's instruction.

II

Appellant did not move for the compulsory process of a witness in the court below; consequently he is foreclosed from complaining about his absence on appeal

Appellant objects for the first time on appeal, in violation of the rule requiring that a defendant make "known to the court the action which he desires the court to take." Fed. R. Crim. P. 51. Nor did appellant below, by way of any request for appropriate instruction, bring the significance of the absence of this witness to the attention of the court. Had he done so the court could have preliminary ascertained whether the witness was peculiarly available to one side.[3] Moreover no substantial right is involved. The witness was the only one living at a vast distance. He was in California when the case came to trial. As his testimony would have been cumulative the gain from his compulsory presence would not justify the inconvenience to him and the expense to the government.

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[3] It is significant that no application was made as provided under Rule 17 (b) of the Federal Rules of Criminal Procedure, to subpoena the witness that appellant now asserts was essential to his trial. Particularly is this true where the record shows that the accused knew the existence of the witness. See *Word* v. *United States*, 199 F. 2d 801 (2d Cir. 1955); *United States* v. *Paccione*, 224 F. 2d 801 (2d Cir. 1955); *Morton* v. *United States*, 79 U. S. App. D. C. 329, 147 F. 2d 28 (1945).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the lower court be affirmed.

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